

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
E.SPIRE COMMUNICATIONS, INC.,)	Case No. 01-974-LHK
et al.,)	
)	
Debtors.)	
_____)	
)	
GARY F. SEITZ,)	
Chapter 11 Trustee,)	
)	
Appellant/Cross-Appellee,)	
)	
v.)	Civ. No. 03-1116-SLR
)	
XSPEDIUS MANAGEMENT CO., LLC,)	
)	
Appellee/Cross Appellant.))	
_____)	

MEMORANDUM ORDER

At Wilmington this 29th day of September, 2004, having reviewed the papers filed in connection with the above cross appeals;

IT IS ORDERED that the memorandum order issued on October 14, 2003 by the bankruptcy court (D.I. 12, ex. 7) is affirmed,¹ for the reasons that follow:

1. This court has jurisdiction to hear an appeal from

¹Consequently, the Trustee's appeal is denied and the appeal of Xspedius Management Co., LLC is affirmed.

the bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. In re Hechinger, 298 F.3d 219, 224 (3d Cir. 2002); In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002).

2. At stake is \$1,308 million held in a "Cure Escrow Account" by order of the bankruptcy court dated September 17, 2002. (D.I. 12, ex. 2) The bankruptcy court in its opinion under review held that these funds should be distributed to Xspedius Management Co., LLC ("XMC") as a matter of equity,

having found that: a) debtor e.spire Communications, Inc. ("e.spire") agreed to pay to Qwest Communications Corporation ("Qwest") \$1,308 million, a sum representing amounts due for overcharging Qwest and for failing to give Qwest contracted-for volume discounts; b) XMC was not a party to this agreement; c) nevertheless, XMC, as the new owner of e.spire, credited the \$1,308 million against its invoices to Qwest "to avoid losing Qwest as a customer and user of XMC's services;" d) because e.spire "breached its settlement agreement with Qwest" to repay the \$1,308 million, the bankruptcy court concluded that "it would be inherently inequitable" to allow the Trustee to keep the funds. (D.I. 12, ex. 7)

3. At the August 15, 2002 hearing which preceded the September 17, 2002 order, counsel for e.spire couched the settlement between e.spire and Qwest in terms consistent with 11 U.S.C. § 365, characterizing the relevant contract (the Access Services Agreement) as one that could be assumed and assigned and of giving Qwest a credit for future services in the amount of \$1.308 million, leaving a "zero dollar cash cure amount." (D.I. 17, ex. 8 at B126) Counsel for Qwest confirmed the arrangement. (Id. at B127) Consequently, the September 17, 2002 order entered by the bankruptcy court refers to an "Escrow Order" by which the \$1.308 million was to be deposited by e.spire into a "Cure Escrow Account." The order then provides, inter alia, as follows:

Notwithstanding anything to the contrary in the Asset Contribution Agreement or the order approving the same, this order, the Escrow Order, or the order approving the settlement between the Debtors and the Acquirer of which the Escrow Order is a material part, the Debtors and the Acquirers reserve all of their respective rights with respect to . . . whether the offset of the Credits by [Qwest] authorized by this order gives rise to any claims in favor of XMC. . . . [E]ither party may file a motion commencing a contested matter seeking an order from the Court disbursing the Credits Escrow to such moving party from the Cure Escrow Account. The Credits Escrow may only be disbursed from the Cure Escrow Account to either the Debtors or the Acquirer upon entry of an order of the Court authorizing such disbursement. . . .

(D.I. 12, ex. 2 at A17-18)

4. The Trustee argues that the bankruptcy court erred as a matter of law when it awarded the escrow funds to XMC, because XMC claimed entitlement to the funds under 11 U.S.C. § 365 as cure amounts and the court concluded that § 365 did not apply.² Therefore, according to the Trustee, XMC has no legal basis to recover the \$1,308 million from the debtors.

5. In my view, however, the matter is a simple one of holding the parties to a standard of candor and good faith with the court. E.spire told the bankruptcy court on August 15, 2002 that the \$1.308 million owed to Qwest would be credited against future services; at that time, e.spire knew that the only way

² “[T]he evidence is clear that e.spire never assumed and assigned the Access Services Agreement to XMC (although it had stated that it would) and that the Court never approved any such assumption and assignment.” (D.I. 12, ex. 7 at A115)

this agreement could be honored was to have XMC provide services and offset its invoices. (See, e.g., D.I. 12, ex. 1; D.I. 13, ex. 8 at A152) At the August 15, 2002 hearing, e.Spire also represented to the court that the Access Services Agreement would be assumed and assigned and that, once the \$1.308 million credits were advanced to Qwest, there would be a zero dollar cure amount. The \$1.308 million deposited into the Cure Escrow Account by e.spire were funds obligated to cure the debt owed to Qwest. XMC paid that debt for e.spire. Under the terms of the September 17, 2002 order, the funds may only be distributed to one of two parties, either the Trustee or XMC. Faced with a decision of how to distribute funds in this factual context, the bankruptcy judge, in my opinion, made the right decision and committed no errors of law. E.spire owed the debt; e.spire has now paid the debt, consistent with the representations of debtors to the court and with the very purpose of the bankruptcy system.

Sue L. Robinson
United States District Judge